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IN THE

Supreme Court of the United States

OCTOBER TERM, 1936.

No. 108

ANDREW J. CHRISTOPHER, THIRD NATIONAL BANK & TRUST CO., AS EXECUTOR OF THE ESTATE OF GEORGE W. WEIMER, DECEASED, ET AL.,

Petitioners,

vs.

W. E. BRUSSELBACK AND W. I. BELL, STEPHEN D. FORST, ET AL., ETC.,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI.

J. ARTHUR MILLER,
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THE GUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

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Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI.

The petition is for a writ of certiorari to review the *intermediate* order of the Circuit Court of Appeals for the Sixth Circuit, reversing the order of the District Court of the United States for the Southern District of Ohio, Western Division, dismissing the bill of complaint.

This court should deny the petition because (a) the decision of the Circuit Court of Appeals is in accord with the decision of the Circuit Court of Appeals for the Second Circuit in *Brusselback, et al.* v. *Cago Corporation, et al.* (N. Y.), 85 Fed. (2nd) 20, certiorari denied 57 S. Ct. 111 (sometimes hereinafter called "*Cago* case"), in which case an action was brought by the same plaintiffs to enforce the

identical liability against the New York stockholders of the same bank; (b) the decision of the Circuit Court of Appeals is not in conflict with the decision of any other Circuit Court of Appeals; (c) the petitioners, contending that the action should be at law and not in equity, took the position in the District Court and in the Circuit Court of Appeals that the decree of the United States District Court for the Northern District of Illinois in *Brusselback* v. *Chicago Joint Stock Land Bank, et al.*, 85 Fed. (2nd) 617, certiorari denied 57 S. Ct. 320, had determined the necessity for and the amount of the assessment and as to those matters such decree was binding upon all stockholders, including the petitioners; consequently, the petitioners are estopped from asserting a contrary position here; (d) the petitioners' contention as to the effect of the local probate laws of Ohio is entirely without merit; (e) there are no questions of public interest involved; and furthermore (f) if certiorari should be granted and, upon hearing, the decree reversed by this court, no benefit would accrue to the petitioners; manifestly the respondents would have leave to amend their bill and the final result would be the same, except that the petitioners might benefit by the ensuing delay.

STATEMENT OF CASE.

This is a class suit in equity, brought by plaintiffs (respondents here) upon behalf of themselves and all other creditors to enforce the liability of the Ohio stockholders of the Chicago Joint Stock Land Bank (hereinafter called "Bank").

The Bank was organized under the Federal Farm Loan Act. Its outstanding capital was $4,000,000.00, divided into shares of the par value of $100.00 each. It issued bonds pursuant to the Act of Congress in excess of $42,000,000.00. Its assets were invested in farm mortgages. In 1932 the Federal Farm Loan Board declared the Bank to be insolvent and placed its assets in the hands of a receiver for liquidation. The liquidation is still in progress.

Immediately after the appointment of the receiver the present plaintiffs, in order to enforce the stockholders' liability, filed their bill in the United States District Court in Chicago, where the Bank was located. The bill was filed pursuant to *Wheeler* v. *Greene*, 280 U. S. 49, which denied the right of the statutory receiver to enforce the liability and held that such liability was enforcible only by a bill in equity filed by creditors. In this suit (sometimes hereinafter called "*Chicago* suit"), the Bank and all of the stockholders, wherever residing, were named as defendants. Those residing in Illinois were served. The Illinois defendants answered and the cause was referred to a Master. The Master found that the Bank was insolvent and that its liabilities exceeded its assets to the extent of $12,000,000.00. The Master recommended an assessment of 100 per cent against the stockholders. The court approved the Master's Report and entered a decree assessing all stockholders 100 per cent of the par value of their shares and entered judg-

ment against those defendants who had been served. Appeal was taken to the Circuit Court of Appeals for the Seventh Circuit. The decree of the District Court was affirmed. *Brusselback* v. *Chicago Joint Stock Land Bank*, 85 Fed. (2nd) 617. Certiorari denied 57 S. Ct. 320.

Shortly after the entry of the decree by the District Court in Chicago the same plaintiffs (respondents here) filed bills in equity in the Federal District Courts of New York and Ohio to collect from the New York and Ohio stockholders respectively. In each of these bills the substance of the decree of the United States District Court for the Northern District of Illinois in *Brusselback* v. *Chicago Joint Stock Land Bank* was alleged. The bill in *Brusselback* v. *Cago* contains the following allegation:

> "Said decree of the United States District Court for the Northern District of Illinois, Eastern Division, fixing and determining the necessity, extent and amount of said assessment against said stockholders of said Chicago Joint Stock Land Bank and the amount due and owing to the creditors of said Chicago Joint Stock Land Bank by said stockholders of the Bank pursuant to said Federal Farm Loan Act (U. S. C. A., Title 12, Chapter 7) is effective and binding upon all of the stockholders of said Bank wherever residing, irrespective of whether such stockholders were parties of record to said proceedings had before said United States District Court for the Northern District of Illinois, Eastern Division, and said decree effectively adjudicates against the defendants herein that all of the stockholders of said Chicago Joint Stock Land Bank, wherever residing, are justly indebted to and liable to the creditors of said Chicago Joint Stock Land Bank, including the complainants herein, for an assessment equal to one hundred per cent (100%) of the par value of the shares of stock held by them, which amount is set forth herein in Exhibit A, attached hereto and made a part hereof."

An allegation substantially the same is contained in the bill of complaint filed in this suit. (R. 5.)

Motions to dismiss upon various grounds were filed in both the New York and Ohio suits and the District Judges in both instances dismissed the bills. Appeals were taken to the respective Circuit Courts of Appeals and the District Court was reversed in each case. The Circuit Court of Appeals for the Second Circuit rendered its opinion on July 3, 1936, in the case entitled *Brusselback, et al.* v. *Cago Corporation, et al.* Certiorari was denied by this court, 57 S. Ct. 111.

The Circuit Court of Appeals for the Sixth Circuit rendered its opinion on December 15, 1936, in the case of *Brusselback* v. *Andis,* now sought to be reviewed here, and in such opinion the court cited and relied upon *Brusselback* v. *Cago* and also *Brusselback* v. *Chicago Joint Stock Land Bank, supra.* Therefore, the Second Circuit and the Sixth Circuit are in entire accord in these identical cases. However, after the *Cago* case and before the decision by the Sixth Circuit in the case here, the Second Circuit rendered a decision on December 7, 1936, in *Holmberg, et al.* v. *Carr, et al.,* 86 Fed. (2nd) 727 (hereinafter sometimes called "*Holmberg* case"), and the petitioners contend that such decision is in conflict with the decision of the Sixth Circuit, here sought to be reviewed. If the *Holmberg* case is in conflict with the decision of the Circuit Court of Appeals in the case here, it is equally in conflict with the Second Circuit's own decision in the *Cago* case. It is, in fact, except possibly as to dictum in conflict with neither.

Point I.

CERTIORARI HAS BEEN DENIED BY THIS COURT IN AN IDENTICAL CASE.

Petitioners assert that the bill of complaint contains no allegations as to the insolvency of the Bank or as to the necessity for an assessment against the stockholders other

than it relies upon the decree of the United States District Court in the District where the Bank is located, and therefore that the Circuit Court of Appeals should have affirmed the lower court's order, dismissing the bill, by reason of *Holmberg* v. *Carr, supra.* The Second Circuit decided *Holmberg* v. *Carr* shortly after deciding *Brusselback* v. *Cago* and in the *Holmberg* case the court referred to the *Cago* case and gave no suggestion that it should be reversed or modified.

It was entirely clear to the Second Circuit, when deciding *Brusselback* v. *Cago,* that the plaintiffs relied upon the decree of the United States District Court of Illinois (*Chicago* case) in determining the necessity for and the amount of the assessment against the defendants in New York, for the decision contains the following language:

> "A suit was brought by creditors in the United States District Court, Northern District of Illinois, Eastern Division, against all the bank's stockholders to assess and enforce their liability and a decree was entered assessing the stockholders 100% of the par value of the shares of stock held by them.
>
> "It is here alleged that such decree, to the extent that it fixes the necessity for and the amount of the assessment, is effective and binding upon all stockholders of the bank irrespective of whether or not they were served in that proceeding."

With such pleading and with such theory the decision found no fault and when the matter was presented to the Sixth Circuit in the present case the court followed *Brusselback* v. *Cago.*

In the *Holmberg* case the plaintiffs proceeded upon a theory entirely different from that adopted by the petitioners in the *Cago* case and in the case here and sought different relief. The bill of complaint in the *Holmberg* case alleged that the Minnesota Joint Stock Land Bank had become insolvent and the creditors had brought a suit in the

District Court of Minnesota; that the court had entered a decree assessing all stockholders, whether served with process or not, 100 per cent of the par value of their shares and had appointed a receiver to collect the assessment. Thus far the bill follows the procedure in the *Cago* case and in the case here, but departs from it in that the prayer of the bill is not for judgments against the stockholders upon the assessment that had been fixed in the Minnesota District Court, but for the appointment by the District Court in New York of an ancillary receiver to collect from stockholders resident in that district. Carr, a defendant stockholder, filed an answer. His answer was summarily stricken as a sham and as frivolous and an ancillary receiver was appointed by the District Court. Upon review, the Circuit Court of Appeals held that the District Court had no power to strike an answer upon the ground that it was a sham and frivolous and also that power was lacking in the court to appoint an ancillary receiver. Such was the extent of the decision upon the issues presented to the Circuit Court of Appeals. The court, however, went further and by way of dictum stated that the assessment in the Minnesota District Court had no extraterritorial effect and therefore the bill should have been dismissed with leave to the plaintiffs to plead over.

It is one thing to say that the decree of the Federal Court in Minnesota had no extraterritorial effect to the extent of empowering another Federal Court in a different jurisdiction to appoint an ancillary receiver, and it is quite a different thing to say that the decree of the Minnesota District Court cannot be used as evidence for the purpose of showing the necessity for and the amount of the assessment against stockholders in other jurisdictions. The actual decision of the case is obviously correct; the dictum, if it is to be given the interpretation as contended for by

the petitioners, is manifestly wrong. The consequence of the dictum, if so interpreted, is that the amount of the assessment would have to be determined anew in each jurisdiction and such a holding is necessarily based upon the assumption that the amount of the assessment would be different in different jurisdictions. This would mean that the various assessments would not be uniform. The stockholders in one jurisdiction would be compelled to pay a different amount from the stockholders in another, all depending upon where such stockholders happened to reside. Thus, the dictum, if followed in the case here, would lead to manifest injustice.

In the *Chicago* case the Bank was a party defendant. The Illinois stockholders, who were of the same class as non-resident stockholders, were also defendants and were at all times vigorously defending. The final decree fixed the assessment at 100 per cent of the par value of the shares held by all stockholders. The defendants appealed to the Circuit Court of Appeals, asserting that the proof was not sufficient. The decree was sustained and this court denied certiorari. The plaintiffs in that case are the plaintiffs in the case here. The same plaintiffs then filed their bill in the *Cago* case and asserted that the *Chicago* decree was binding upon the New York stockholders as to the necessity for and the amount of the assessment. The Circuit Court of Appeals so found and therefore we submit that the dictum in the *Holmberg* case was not intended in any way to modify that court's previous opinion in the *Cago* case, for the court referred to the *Cago* case and did not indicate, even remotely, that it was in any manner dissatisfied with its former opinion.

Therefore, we contend that the Sixth Circuit was in all respects justified in relying upon the *Cago* case, a case identical with the case before them, and furthermore, that

there is no actual conflict between the decisions of the Second and the Sixth Circuits unless the dictum in the *Holmberg* case be given a strained construction and relied upon as a decision.

Even if the petitioners' interpretation of the dictum in the *Holmberg* case is correct, the petitioners are estopped to rely upon it here, as will be immediately demonstrated.

Point II.

PETITIONERS ARE ESTOPPED TO ASSERT HERE THAT THE CHICAGO DECREE IS NOT BINDING UPON THEM AS TO THE NECESSITY FOR AND THE AMOUNT OF THE ASSESSMENT.

The petitioners, as defendants in the Ohio District Court, filed motions to dismiss the bill. In oral argument before the District Judge they argued that (a) inasmuch as an assessment against all the stockholders had been made by the United States District Court in the District where the Bank was located, such assessment was conclusive as to them; and (b) that in view of the fact that the assessment had been fixed at 100 per cent of the par value of the shares, suits to collect such assessments would have to be brought at law and that a suit in equity was not maintainable. They cited *Casey* v. *Galli*, 94 U. S. 673, *Kennedy* v. *Gibson*, 8 Wall. 498, and similar cases. The District Court agreed and dismissed the bill. Petitioners took the same position upon appeal, as will be seen from their brief.

The following is quoted from page 4 of the brief filed by petitioners as appellees in the Circuit Court of Appeals:

> "This suit in Ohio is merely one to *collect* the assessment heretofore assessed and levied by the Chicago decree.
>
> "In such an action to collect a shareholder's double liability assessment, *theretofore fixed and levied*, the

remedy is at law. This legal remedy is adequate, full and complete, and equitable relief is uniformly denied. (Citing cases)."

The following appears on Page 9 of such brief;

"In this present case the bill recites the assessments against the shareholders have already been made. (R., 5, 32.) We submit that it is immaterial whether the assessments provided for in the Federal Farm Loan Act (12 U. S. C. A., 812) be made by a court of equity, as directed in *Wheeler* v. *Greene*, or whether they be made by an administrative officer of the Government, such as the comptroller of the currency under the National Banking Act, 12 U. S. C. A., 64, as in *Casey* v. *Galli*, 94 U. S., 673, or the superintendent of banks under the New York Banking Act, as in *Broderick* v. *American General Corporation* (CCA-4), 71 F. (2d), 864, 867.

"*The important query is not how were the assessments made; but have the assessments been made?*

"Such assessment, once made in the manner provided by law (whether by an administrative officer or by a court of equity) is collectible, as any other fixed obligation, in an action at law."

Therefore, the petitioners having heretofore taken a position directly contrary to the position they now assert, are bound by the familiar rule of law to the effect that where a litigant once assumes a position in a case and obtains a ruling from the court favorable to such position, such litigant may not thereafter assume a contrary position. *Davis* v. *Wakelee*, 156 U. S. 680, 689.

Point III.

The Probate Laws of the State of Ohio are not pertinent.

Petitioners contend that under the probate laws of Ohio no action may be brought to adjudicate a claim against an executor of the estate of a deceased person unless the claim has first been presented to the executor within four months

after his appointment. In the present case many, if not all, of the executors had been appointed more than four months before any claim arose. It would seem to be sufficient answer to the above contention to point out that a law of any state which bars a claim before it arises is invalid under the Fourteenth Amendment. Petitioners, however, apparently misconstrue the probate laws of Ohio for the Supreme Court of that state has held adversely to petitioners' contention.

In *State, ex rel. Fulton, Supt. of Banks,* v. *Bremer,* 130 O. S. 227, the court said (page 236):

> "There is no law of Ohio making it mandatory upon a claimant against a decedent's estate to present his claim for allowance before entering suit."

Petitioners interpret the probate laws of Ohio as requiring a claimant to present his claim to an executor within four months after his appointment as a condition precedent to the bringing of a suit to adjudicate such claim and rely upon *Pufahl, Receiver,* v. *Estate of Parks,* 81 L. Ed. 73, as holding that such local probate laws are binding upon claimants even though they bring their action in a Federal Court.

Petitioners misconceived the decision in that case. In the first place, the claimant there proceeded in the state court and, more important, the question in that case was not whether the claimant had the right to have his claim adjudicated but whether he had the right to participate in the assets of the estate and if so on what basis. In the case here the respondents are merely seeking an adjudication of their claims in the Federal Court, and this court, in the *Pufahl* case, discussed a similar situation and in speaking of the right of a claimant who otherwise had the right to litigate in the Federal Court, said:

> "While he may not be denied his right to prosecute an action to judgment or a suit to final decree in the

federal court, such judgment or decree can do no more than adjudicate the validity and amount of his claim. The marshalling of that claim with others, its priority, if any, in distribution, and all similar questions, are for the probate court upon presentation to it of the judgment or decree of the federal court."

Conclusion.

The petitioners have raised no questions which warrant review by this court. There are no questions of public interest involved. The decision of the Circuit Court of Appeals for the Sixth Circuit is in accord with the decision of the Second Circuit in *Brusselback* v. *Cago, supra,* an identical case, in which this court has denied certiorari, and there is no conflict as asserted by the petitioners between the decisions of the Sixth Circuit and the Second Circuit.

Moreover, even though certiorari be granted and the decision of the Circuit Court of Appeals reversed, the respondents would undoubtedly have the right to amend their bill and allege the insolvency of the Bank, the extent thereof, and the necessity for the assessment by allegations independent of any reference to the *Chicago* decree, and as the respondents are the same persons who were the plaintiffs in the *Chicago* case, and as the same proof would be available to them in the Ohio case, the amount of the assessment, as determined anew in Ohio, would be the same as determined in Illinois and no purpose would have been served other than to give delay to the petitioners.

Therefore, no useful purpose would be served in granting the writ applied for and the petition for writ of certiorari should be denied.

Respectfully submitted,

J. Arthur Miller,
George R. Murray,
Solicitors for Respondents.

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REPLY BRIEF OF RESPONDENTS.

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THE LAKESIDE PRESS, 350 WEST MADISON, CHICAGO

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Respondents.

REPLY BRIEF OF RESPONDENTS.

STATEMENT OF CASE.

This is a class suit in equity, brought by respondents in the Federal District Court of Ohio upon behalf of themselves and all other creditors to enforce the double liability provided for in U. S. C. A. Title 12, Sec. 812, against the Ohio stockholders of the Chicago Joint Stock Land Bank (hereafter called Bank). A history of the previous litigation is necessary to a full understanding of the matters before this Court.

The Bank was organized under the Federal Farm Loan Act. Its outstanding capital was $4,000,000.00, divided into